

Sierra Club v. Austin, Nos. 03-35419, 03-35537, 03-35550

**DEC 2 2003**

**KOZINSKI**, Circuit Judge, dissenting in part:

**CATHY A. CATTERSON**  
**U.S. COURT OF APPEALS**

After the 2000 wildfires tore through the Lolo National Forest, burning 74,000 acres, the Forest Service was confronted with the daunting task of devising a response to this devastating natural disaster. The agency selected a project that would deal with the disaster on two fronts: restoration and recovery of watersheds and restoration and recovery of land. The project would include, among other things, planting 12,000 acres in areas where natural regrowth is absent due to the severity of the fires; commercially thinning 10,000 acres of unburned timber and timber burned by low-intensity fires; salvaging 5,000 acres of fire-damaged, dead and dying timber; salvaging 100 acres of insect-killed timber; constructing three miles of temporary roads to access the treatment areas; and closing 140 miles of unneeded roads. Lolo Nat'l Forest Post Burn Final Env'tl. Impact Statement S-2. The need to undertake such measures promptly should be particularly obvious to those of us who live in Southern California.

As commanded by NEPA, 42 U.S.C. § 4332, the agency prepared a comprehensive Environmental Impact Statement rife with detailed analysis of the project's impact on the environment, including on unroaded areas. See FEIS Ch. 3.10 and 4.5. The EIS exceeds 1,100 pages and devotes 250 pages to analysis of the affected environment, EIS Ch. 3, and more than 160 pages to analysis of the

project's environmental consequences, EIS Ch. 4. It contains over 150 detailed maps and even includes instructions on how to read it.

The agency involved the community in its decisionmaking process, holding “pre-scoping” meetings in areas most affected by the fires, EIS S-3, and mailing information packets to 1,361 interested individuals and organizations, EIS S-4. It held open houses, educated area students, conducted public tours and published notices and information in local newspapers. Id. It involved the United States Environmental Protection Agency and the Montana Department of Environmental Quality, and both expressed their support of the project. EIS S-5. It published a draft EIS and solicited public comments, which were extensive, and responded to them in a thorough, reasoned manner, see Lolo National Forest Post Burn EIS Response to Comments (Appendix I), available at <http://www.fs.fed.us/rl/lolo/projects/post-burn/feis/docs/q-i-res-com.pdf>. The responses to public comments alone comprise nearly 200 pages of the final EIS. After its extensive public education campaign and involvement of interested parties, the agency weighed the positive effects of the project against the negatives and decided to adopt it.

As it turns out, the project will actually increase the amount of unroaded acreage by decommissioning 224 miles of roads, ROD-15, thereby adding nearly

2,000 acres of additional unroaded area, see FEIS 4-26. My colleagues never acknowledge this benefit. Nor do they mention that 60 percent of the harvest will be conducted by helicopter, minimizing any trace of harvesting, and that the majority of the harvest will occur in burned areas, which are already marred by the fires. FEIS 4-27.

The majority's claim that there was no "analysis of the project's impact on the potential for the unroaded areas to be designated as IRAs or wilderness in the future," Memdispo at 7, is simply untrue. The agency candidly admitted that the harvest in unroaded areas might "have an effect on the apparent naturalness and natural integrity of these areas and thus may reduce their potential for being reallocated to Inventoried Roadless or Wilderness Areas under the Forest Plan revision process," ROD-28, but concluded that, whatever the negative impact, it won't be irreversible because of the mitigating measures the agency plans to take. See FEIS 4-27 (discussing the use of helicopter yarding and temporary roads). This was reasonable in light of Forest Service regulations allowing previously harvested areas to be classified as wilderness "where logging and prior road construction are not evident." Forest Service Handbook 1909.12, Ch. 7.11a(9).

My colleagues complain that Chapter Three of the EIS devotes fewer pages to unroaded areas than to Inventoried Roadless Areas. See Memdispo at 7 n.1.

Whether an agency has given an issue the requisite hard look should not depend on how many pages of a report are devoted to it. Nonetheless, the majority's allegation that Chapter Three devotes "only a few paragraphs" to unroaded areas is wrong. Chapter Three devotes nearly five pages to listing every unroaded area and describing its general characteristics. See FEIS 3-66 to 3-70. Moreover, the unroaded discussion does not end with Chapter Three. The majority overlooks Chapter Four, titled "Environmental Consequences," which devotes seven pages to discussion of unroaded areas compared to five pages to discussion of Inventoried Roadless Areas. Compare FEIS 4-23 to 4-29 with FEIS 4-18 to 4-23. Chapter 4.5.3, titled "Effects on Unroaded Resources," analyzes the effects of each proposed alternative on the various unroaded areas. It discusses the impact on naturalness, changes in the land's appearance, how long it would take for regeneration, the density of the trees and even potential for weed spread. See FEIS 4-23 to 4-28. In addition, Chapter Four contains two long tables regarding vegetation management activities, one describing the treatment type and yarding system to be used in each unroaded area under proposed alternative four, FEIS 4-26 to 4-27, and the other providing that information for proposed alternative five, FEIS 4-28 to 4-29. Cursory this is not.

As my colleagues acknowledge, "NEPA is a procedural statute, not a

substantive one.” Memdispo at 4. Our role is limited to making ““a pragmatic judgment whether the EIS’s form, content and preparation foster both informed decision-making and informed public participation.”” Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001) (quoting California v. Block, 690 F.2d 753, 761 (9th Cir. 1982)). The agency identified the effects of the proposed project—both good and bad—and made an informed, reasoned decision. The attention given to the unroaded issue more than meets the statutory requirements.

The majority cites Smith v. U.S. Forest Service, 33 F.3d 1072, 1078 (9th Cir. 1994), for the proposition that “logging in an unroaded area is an irreversible and irretrievable commitment of resources that could have serious environmental consequences.” Memdispo at 5 (internal quotations omitted). But in Smith, the agency failed to independently consider the impact of a timber sale on roadless resources. An ordinary sale does not present the kind of exigency created by a natural disaster. Moreover, the agency’s review there really was deficient because it did not look at the effect of the sale on unroaded resources at all. Id. at 1078-79. Here, the agency compiled a massive, detailed report analyzing the impact on unroaded resources and concluded that, despite some drawbacks, the benefits made the project worth pursuing. Moreover, it arrived at this decision after considering and responding to public comments on this precise issue. See

Response to Comments 164-65. Because satisfying the majority's nitpicking (including at least another round of judicial review) will needlessly delay by at least two years a much-needed response to an emergency that is already three years old, I respectfully dissent from that portion of the memorandum disposition dealing with the unroaded areas.